Last Radio Group Corp. *and* District Lodge 15, International Association of Machinists and Aerospace Workers, AFL–CIO. Case 29–CA–22356

December 31, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Pursuant to a charge filed on October 26, 1998,[1] the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on November 4, 1998, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 29–RC–8963. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On November 25, 1998, the General Counsel filed a Motion for Summary Judgment. On November 30, 1998, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer, the Respondent denies that the Union requested the Respondent to bargain and that it refused to bargain. Further, the Respondent attacks the validity of the Board's certification on the basis of the Board's unit determination in the representation proceeding.[2]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding.[3] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[4]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a New York corporation with its principal office and place of business located at 43–22 Van Dam Street, Long Island City, New York, where it has been engaged in the business of providing two-way radio dispatch transportation services.

During the 12-month period preceding issuance of the complaint, which period is representative of its operations in general, the Respondent, in the course and conduct of its business operations, derived gross annual revenues valued in excess of $500,000 and purchased and received at its Long Island City facility goods and materials valued in excess of $5000 directly from enterprises located outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and

[1] The Respondent claims it is without knowledge or information sufficient to form a belief as to the truth of the complaint allegations pertaining to the filing and service of the unfair labor practice charge in this case, but admits that a copy of the charge was received in late October or early November 1998.

[2] The Respondent's answer denied a number of complaint allegations. None of these denials warrants a hearing, as other record evidence establishes the General Counsel's allegations. Thus, the Respondent denied the complaint allegation that it is an Employer engaged in commerce, although it admits the allegation that it is a New York corporation and that it satisfies the Board's jurisdictional standards for interstate commerce. The Respondent denies that on April 29, 1998, the Union was certified by the Board notwithstanding its request for review of that certification. The Respondent denies that the Union requested bargaining and that it refused to bargain. We find these denials raise no issue warranting a hearing. We note that the Respondent does not challenge the authenticity of the following two letters appended to the Motion for Summary Judgment: a May 15, 1998 letter from the Union requesting that the Respondent meet and bargain, and a May 20, 1998 letter from the Respondent refusing to do so. Under these circumstances, we find that a bargaining request was made, and we also find that the Respondent has refused to bargain. See *Hydro Conduit Corp.*, 242 NLRB 171, 172 fn. 5 (1979).

[3] In its opposition to the summary judgment motion, the Respondent argues that the underlying representation case was decided before the Board's decisions in *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998), and *Roadway Package System, Inc.*, 326 NLRB 842 (1998), and that it is "inconsistent with the totality of the circumstances analysis . . . followed in those two cases." We disagree. The Regional Director's analysis in the underlying representation case is consistent with the Board's analysis in *Roadway Package* and *Dial-A-Mattress*. Further, as the panel majority noted in denying review of the Regional Director's decision, "under any application of the common law agency test" the drivers in this unit are "employees and not independent contractors."

The Respondent also argues that the motion should not be granted because the Board has not resolved "whether the franchisees who serve on the Security and Communications Committees are supervisors within the meaning of Section 2(11) of the Act." The Respondent contends that because these individuals were permitted to vote under challenge and their votes were not determinative, their status was not resolved. The failure to resolve the status of these individuals is not a basis for denying the motion here. In the event the parties are unable to resolve the issue themselves, the Board will do so in a unit clarification proceeding. *Avecor, Inc.*, 309 NLRB 73, 74 fn. 15 (1992).

[4] Member Hurtgen notes that he dissented from the Board's April 14, 1998 denial of the Respondent's request for review of the Regional Director's Decision and Direction of Election. However, he agrees that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice case and, for institutional reasons, agrees with the decision to grant the General Counsel's Motion for Summary Judgment. Member Hurtgen does not pass on the majority's evaluation of the analysis of the Regional Director in the underlying representation case.

(7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held April 14, 1998, the Union was certified on April 29, 1998, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time limousine drivers employed by Respondent at its Long Island City facility, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

On May 15, 1998, the Union, by letter, requested that the Respondent meet and bargain with it for an initial collective-bargaining agreement, and, on May 20, 1998, the Respondent refused to do so. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after May 20, 1998, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Last Radio Group Corp., Long Island City, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with District Lodge 15, International Association of Machinists and Aerospace Workers, AFL–CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time limousine drivers employed by Respondent at its Long Island City facility, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Long Island City, New York, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 29 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 20, 1998.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with District Lodge 15, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL , on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time limousine drivers employed by us at our Long Island City facility, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

LAST RADIO GROUP CORP.